

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.07.2015

CORAM

THE HONOURABLE MS. JUSTICE R.MALA

S.A.No.866 of 1999
and C.M.P.No.8832 of 1999

Judgment reserved on 15.07.2015	Judgment pronounced on 22.07.2015
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1.Munirathinam .. 1st Appellant/ 2nd Appellant/2nd defendant

2.Poovammal

3.M.Murugan

4.M.Ramasamy

5.M.Nagaraj

6.M,Selvaraj

.. Nil/Appellants 3 to 7
(LRs of deceased 1st appellant /
Appellants 2 to 6)

Vs

T.Chinnappan .. Respondent/Respondent/Plaintiff

Prayer: Second appeal filed under Section 100 of CPC against the Judgment and Decree dated 27.03.19968 in A.S.No.3 of 1998 on the file of the learned Appellate Authority and Subordinate Judge, Krishnagiri confirming the Judgment and Decree dated 25.01.1996 in O.S.No.258 of 1987 on the file of the District Munsif Court, Krishnagiri.

For Appellants : Mr.V.Nicholas
For Respondents : Mr.V.Raghavachari

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 27.03.19968 in A.S.No.3 of 1997 on the file of the learned Appellate Authority and Subordinate Judge, Krishnagiri confirming the Judgment and Decree dated 25.01.1996 in O.S.No.258 of 1987 on the file of the District Munsif Court, Krishnagiri.

2.The respondent as a plaintiff filed a suit for declaration that he has the right to use the suit passage,

marked as A B C D in the rough plan to reach his house from Periathoppu road on the north and also permanent injunction stating that the respondent/plaintiff and the first appellant Munigundappa are the brothers and the second appellant is the son of the first appellant. The suit property is an ancestral property and the suit passage was in existence for more than 50 years as a way to wherever it leads from Periathoppur road. Immediately South of the said Periathoppur road is the house of the first defendant. His house is constructed facing east with front door passage facing the suit passage. Immediately next South of the defendants house is the plaintiff's house and he also constructed the house facing passage. The suit passage is a common piece of land belonging to both the family ancestrally. Hence, he sought for declaration and injunction. Resisting the same, the defendants filed a written statement stating that there is no pathway and the plaintiff is having alternative pathway and prays for dismissal of the suit.

3.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, P.W.2, D.W.1, Exs.A1 to A10, Exs.B1 to B3 and Exs.C1 to C4 and decreed the suit. Aggrieved against the judgment and decree of the trial court, the defendants preferred an appeal in A.S.No.3 of 1997 on the file of the learned Appellate Authority and Subordinate Judge, Krishnagiri.

4.The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and reversed the Judgment and Decree passed by the Trial Court and dismissed the appeal by holding that the suit passage is the common pathway and the plaintiff is entitled to use the pathway. Against the Decree and Judgment of the first Appellate Court, the present second appeal has been preferred by the defendants.

5.At the time of admission of the above second appeal, the following substantial question of law was framed for consideration.

"When the plaintiff did not place any evidence to show that a pathway is in existence in the suit property and that too from time immemorial, whether the Courts below are correct in granting the relief to the plaintiff?"

6.Challenging the judgment and decree of both the Courts below, the learned counsel appearing for the appellants would submit that as per Ex.B1, sale deed wherein an alternative way has been mentioned and hence the respondent/plaintiff is not

entitled to use the suit passage. He would also submit that both the Courts below have failed to consider the 5 ft width road on the western side of the defendants house for the use of all the five sharers to reach the Periathoppu Road and so, the Trial Court has granted the decree merely because an open space is available in front of the defendants house. He further submitted that both the Courts below have not considered the fact that the respondent/plaintiff has not discharged the burden regarding the existence of pathway in the suit property. Hence, he prayed for setting aside the judgment and decree of both the Courts below.

7. Resisting the same, the learned counsel appearing for the respondent would submit that the Commissioner was appointed and he inspected the suit pathway and filed a report Exs.C1 and C2, wherein he has specifically mentioned that no other pathway is available. He would also submit that objection has not been filed by the appellants for the Commissioner report and further clarification has been given by the Commissioner in Exs.C3 and C4, wherein he has stated that he has inspected the property after eight years and given a report. Hence, he prayed for dismissal of the appeal.

8. Considered the rival submissions made on both sides and perused the material records and both oral and documentary evidence.

9. Admittedly the first appellant and the respondent are own brothers and they got the property by way of partition. It is also admitted fact that there is a way leading to Periathoppu Village from Maharajakadai. The defendants mainly focusing on Ex.B1, sale deed which came into existence on 05.09.1984 wherein one Pappammal executed the settlement deed in favour of her grand children wherein it was stated as common pathway between the plaintiff's land and first defendant's land. But on perusal of the plan along with the Commissioner report, no such road has been mentioned. As soon as the suit was filed on 02.06.1987, Commissioner was appointed and he inspected the property on 05.06.1987 and filed a report, wherein he has specifically mentioned that a pathway is leading from Maharaja Kadai village to Periathoppu Village through the suit locality. In paragraph No.2 of the Commissioner report, Exs.C1 and C2, it was stated as follows:

"2..... The plaintiff claimed that he was using the space HGLM to go his house. There was no way except in the space HIMLG."

10. So, the Commissioner has categorically stated that there was no way except HIMLG and in that HGLM is the suit pathway. So, I am of the view that as per the Commissioner's report and

the plan, except the suit pathway there is no way to the respondent to reach the road leading to Periathoppu village to Maharaja Kadai. It is pertinent to note that the property is the ancestral property. The plaintiff and the first defendant are the brothers and they got divided. So, the property of the respondents is abetting the road on the northern portion, the property of the respondent is on the south of the appellants. Therefore, naturally if the respondent wants to reach the Periathoppu road, he ought to have use the passage mentioned in HGLM. But it is to be noted that after eight years on 18.06.1995, the Commissioner re-visited the property and filed a report, Exs.C3 and C4, wherein he has stated that a wall and a fence has been put up. He further stated that 5 feet pathway has been given to the plaintiff. But there is no dividing ridge between the said 5 feet portion of the said Sevathan and Venkatesan. Further it was stated that there are traces of pathway through the portion of the said Sevathan and Munirathnam from the house of the plaintiff. But there are no traces of pathway in the portion of 5 feet breadth behind the house of the defendants, which shows that after filing the suit, further development has been made. As per the Commissioner report, Exs.C1 and C2, which was filed as soon as the suit was filed, there was a pathway and so, the respondent/plaintiff is entitled for declaration and injunction. That factum was rightly considered by both the Courts below. In such circumstances, I am of the view that both the Courts below have considered all the aspects in proper perspective and came to the correct conclusion. Hence, the decree and judgment passed by both the Court below does not warrant any interference and the same are hereby confirmed. The second appeal is liable to be dismissed and it is hereby dismissed.

11. In fine,

- Second appeal is dismissed with costs.
- The decree and judgment passed by both the Courts below are hereby confirmed.
- Consequently connected civil miscellaneous petition is closed.
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cse

-s/d-

Assistant Registrar (CS-V)

True Copy

Sub-Assistant Registrar

To

1. The Appellate Authority and Subordinate Judge,
Krishnagiri.

2.The District Munsif Court, Krishnagiri.

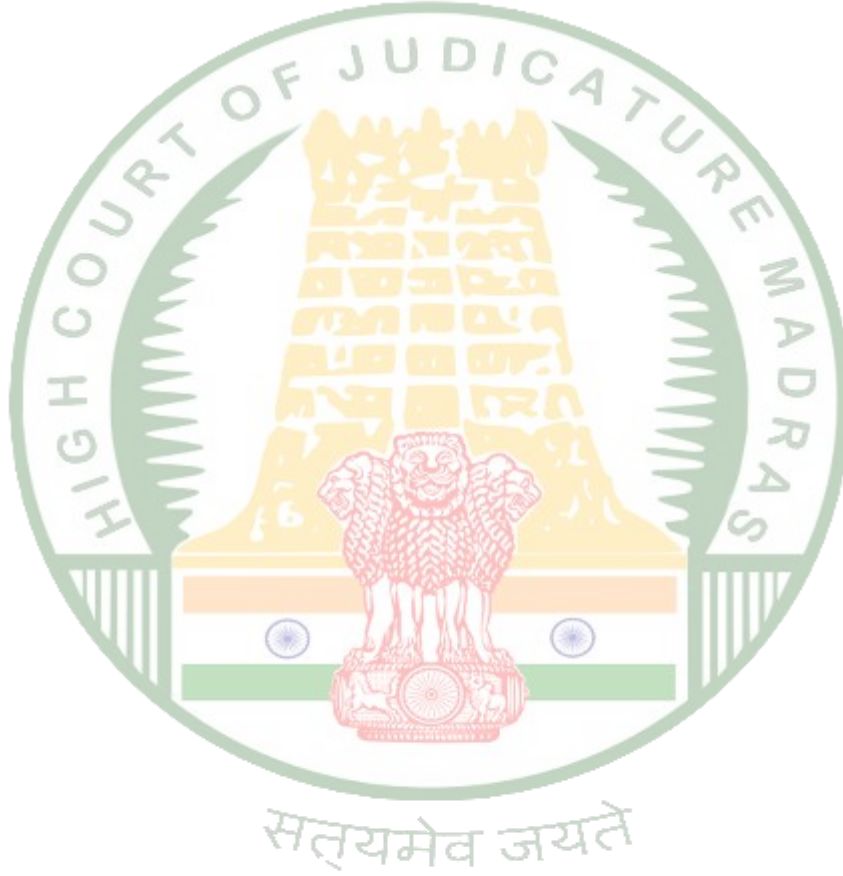
3.The Record Keeper,
V.R.Section, High Court, Chennai.

+ 1 cc to M/s.V.Raghavachari, Advocate SR 36949

+ 1 cc to M/s.V.Nicholas, Advocate SR 37290

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